Nos. 80-207, 80-213, 80-214

SEP2 1
MICHAEL RODAK,

IN THE

Supreme Court of the United States

October Term, 1979

CBS, Inc.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATEMENT OF THE CASE

Respondent National Association of Broadcasters (NAB)[1] relies upon the Statement of the Case found in those Petitions for Certiorari submitted to this Court.

SUMMARY OF ARGUMENT

In this brief memorandum, respondent NAB states its support for the many reasons advanced by petitioners justifying the issuance of a writ of certiorari to the Court of Appeals for the District of Columbia Circuit. Petitioners demonstrate that Section 312(a)(7) of the Communications Act, as construed by the Federal Communications Commission (J.A. 69a) and affirmed by the court below (J.A. 1a), violates broadcasters' First Amendment and statutory rights by usurping from broadcasters the editorial discretion involved in the provision of broadcast time to candidates for federal office. Such construction, as emphasized by petitioners, is inconsistent with the fundamental premise of broad licensee discretion embedded in the Communications Act, contrary to the legislative history and purposes of Section 312(a)(7) and in basic conflict with this Court's interpretation of Section 312(a)(7) in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*CBS* v. *DNC*) 412 U.S. 94, 113-114 (1973).

The recent decisions of the Commission and the court below rejecting the argument that broadcasters may adopt political sales policies fashioned to uniformly meet the needs of all candidates is in sharp contrast to the Commis-

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[1]NAB was an intervenor in the proceedings below and files today as respondent supporting the position of petitioners, pursuant to Rules 19.6, 22 and 34.2 of this Court.

sion's heretofore consistent policy of broadcasters affording equal treatment to political candidates vying for the same political office. Requiring a broadcast licensee to focus solely on the individual candidate's needs, as stated by the candidate, and appointing the Commission as the final arbiter of the station's "reasonableness" in meeting these individual candidate needs, impermissibly restricts the broadcaster's editorial judgment and establishes a dangerous system of government second-guessing and programming control. The underlying Commission decision and reconsideration denial, voted along political party lines, highlights the potential for government manipulation of political access under the Section 312(a)(7) construction adopted by the Commission and affirmed by the court below.

Though arising in the context of a request for network access by a presidential incumbent, the decision below applies with equal force to political advertising requests by candidates for the Senate and the House of Representatives. It will be individual stations, not networks, that will be presented with such federal candidate "reasonable access" requests. NAB, which represents the interests of over 5,000 radio and television stations, emphasizes here the sweeping nature of the Commission's abrupt change in policy *vis-a-vis* individual station decisionmaking. Absent review by this Court, the editorial rights of individual stations would be severely constricted and the Commission would be conferred with the Constitutionally objectionable (and virtually impossible) administrative task of reviewing each station determination as to when a campaign has begun and whether reasonable access has been afforded. The Commission and the court below have failed to give individual local stations, faced with a multitude of federal and non-federal political access requests, any

clear guidance. Instead, these licensees are left with little more than the Hobson's choice of granting each federal candidate's request in full or risking Commission censure or even license revocation based on a subjective after-the-fact review. To place broadcast licensees in such a position violates not only the First Amendment but the spirit and letter of the Communications Act and the clear ruling of this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT AND HAS DECIDED AN IMPORTANT STATUTORY QUESTION CONTRARY TO A DECISION OF THIS COURT.

The lower court's affirmation of the Commission's decision raises a considerable number of concerns directly affecting all of broadcasting. NAB supports the network petitioners in their request for the writ of certiorari with the hope that these important questions may be answered. In particular, NAB wishes to underscore petitioners' basic argument that the lower court erred in affirming the Commission ruling that, when making reasonable access decisions, networks (indeed, all broadcasters) must give preeminence to the "individual needs" of the candidate for program time. The court's decision on this matter upsets the delicate balance of rights between candidates and broadcasters established by Congress in §312(a)(7). The reasoning of the court's decision would have broadcasters' reasonable access decisions determined more by the needs of an individual candidate than by the needs of all candidates taken together. Such a construction of Section

312(a)(7) would be in basic conflict with the Congressional policy of giving equal treatment to all candidates for the same office.[2]

Moreover, the lower court's decision has the effect of casting the Commission in the role of final arbiter of each "reasonable access" decision. This redefining of the Commission's role is repugnant to the basic legislative scheme of §312(a)(7),[3] and contrary to the First Amendment principles articulated by this Court. In *CBS* v. *DNC, supra,* this Court held that broadcasters' journalistic decisions must be shielded from government's oversight. There the Court pointed to the dangers inherent in the "enlargment of government control over the content of broadcast discussion" and government second-guessing of "the day-to-day operations of broadcasters' conduct."[4]

But the decision below would deprive broadcasters of the journalistic discretion assured by *CBS* v. *DNC.* This means that broadcasters must now "tailor" their responses to the needs of an individual candidate. Broadcasters are no longer free to adopt policies of broad application designed to accommodate the needs of all candidates and to take into account their other operations and scheduling. Although networks and stations are still permitted to consider these factors, to some degree, they must give *special* weight to an additional factor identified by the Commission: "the specific needs of the candidate." (J.A. 41a.) and that weighing process for the individual candidates is to

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[2]Section 315(a) of the Communications Act, establishing the law of equal opportunities, is based on equality of treatment of all candidates running for a particular office, be it federal or non-federal.

[3]S. Rep. No. 96, 92d Cong., 1st Sess. (1971).

[4]412 U.S. at 126-127.

be supervised by the Commission on a "campaign-by-campaign" basis. (J.A. 29a).

The opinion of Judge Bazelon gives but short shrift to the dangers inherent in this characterization of reasonable access. Judge Tamm, in his concurring opinion however, eloquently identifies the clear dangers and potential "benefits" of this interpretation of Section 312(a)(7):

> ". . . Section 312(a)(7), as implemented by the Commission, stands precariously on the first amendment tightrope. It raises the serious danger of nonneutral government action favoring one speaker or viewpoint over another. Yet, it also makes a great contribution to the cause of encouraging an 'uninhibited, robust, and wide-open' discussion of issues central to our system of government." (J.A. 67a.)

Unfortunately, Judge Tamm resolved this tension in favor of the Commission by a leap of faith, with the hope that "adequate safeguards" would minimize the dangers of this oversight role. NAB does not share Judge Tamm's optimism. The potential for government favoritism and abuse in this area is simply too great. Indeed, as Judge Tamm recognized, it is inherent in the decision-making process itself:

> ". . . we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests . . . the President of the United States appoints all seven of its members and designates its chairman. (*See* 47 U.S.C. Section 154(a) (1976)). Commissioners serve seven-year terms, and vacancies occur approximately once a

> year. (*Id.*, Section 154(c)). To the extent that openings arise, the President may, and typically does, ensure that four of the seven Commissioners are members of his own political party. (*See* Section 154(b)). As the present case suggests, the campaign for President is likely to be the most important occasion for the application of Section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a Presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners. *Even if a Commissioner makes every effort to remain impeccably neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously infuence his decision-making."* (J.A. 63a-64a.) [Emphasis Added]

The fear of increased government involvement and the inevitable political overtones that accompany such activity are concerns petitioners present. The implications of a "politically interested" agency controlling the very elective process which governs the fate of that agency's personnel is fraught, at the very least, with potential for the appearance of impropriety. Both petitioners and Judge Tamm's concurrence accurately reflect the concern such a situation presents. It is essential to a free electorate that government involve itself as little as possible in the elective process. The Commission's decision and the resulting implication represent involvement in opposition to previous policies, contrary to the best interests of the public, and in direct conflict with the First Amendment.

The political factors identified by Judge Tamm and petitioners were the very kinds of dangers that this Court recognized in *CBS* v. *DNC*. Indeed, up until the time it decided the instant case, involving an incumbent Presidential candidate, the Commission itself refrained from entering into programming decision second-guessing when construing Section 312(a)(7). *Re Complaint of Honorable Pete Flaherty,* 48 FCC 2d 838 (1974); *Matter of Anthony Martin-Trigona,* 66 FCC 2d 968 (1977). In *Pete Flaherty,* the Commission observed

> ". . . were we to call upon licensees to justify their programming selections and scheduling, the matter would come down to a judgment as to what was presented, and when, as against what should have been presented, and when — a judgmental area for licensees exercising their sound journalistic discretion and one which this Commission must avoid." (48 FCC 2d at 849.)

That sentiment was reiterated in *Martin-Trigona,* wherein the Commission held that a licensee's discretion extends

> ". . . not only to the type and amount of time to be made available to candidates, but also to the date on which campaign coverage will commence." 66 FCC 2d at 969.

Indeed, it appears that the factual distinction which led the Commission to depart from the reasoning of *Pete Flaherty* and *Martin-Trigona* in the instant case was the identity of the candidate involved.

The court below, in *Columbia Broadcasting System, Inc.* v. *FCC,* 454 F.2d 1018 (1971), a case involving Presidential media access, observed that a Commission decision disregarding Commission precedent and favoring

the incumbent President "raises serious questions concerning the requirement of government neutrality in the area of the First Amendment." 454 F.2d at 1034. No matter what safeguards are applied, it is difficult to see how, in this highly charged political atmosphere, the Commission can maintain a neutral oversight role under its judicially-affirmed construction of Section 312(a)(7). Moreover, despite the lower court's suggestion that such an oversight role is necessary to protect the "public's right to be informed about elections," (J.A. 47a) neither the Commission nor the complaining committee had contended that the public has not been fully informed about the primary elections or the President's campaign. Where, as here, there is no compelling need for government oversight, there can be no justification for an intrusion upon valued First Amendment rights.

Petitioners' concern over the Commission's delving into broadcasters' editorial/journalistic judgments is well-founded. The issues of increased governmental activity in the elective process and the further intrusion of government in areas until now protected by the First Amendment, most certainly require evaluation and clarification by this Court so both broadcasters and the Commission may fully understand the parameters within which they respectively are to function.

The lower court's ruling, in addition to being interpreted as an affirmation of the Commission's unjustified reversal of prior policy, is also seen by NAB as directly contrary to this Court's determination that Section 312(a)(7) "essentially codified" the Commission practice concerning the requirement that broadcasters make time available for political candidates – a practice which relied on broadcasters' good faith discretion. *CBS* v. *DNC, supra,* 412 U.S. at 113-14, n.12. With the lower court's cavalier

dismissal of this plain language as "dictum",[5] there is a clear conflict now existing between this Court's interpretation of Section 312(a)(7) and the lower court's ruling. It is essential that a writ of certiorari be granted to resolve this matter.

II. THE DECISION OF THE COURT BELOW, DEPRIVING INDIVIDUAL BROADCAST STATIONS OF THEIR STATUTORY AND CONSTITUTIONAL RIGHTS AND ESTABLISHING AN UNWORKABLE AND UNLAWFUL SYSTEM OF GOVERNMENT OVERSIGHT OF EDITORIAL DISCRETION, SHOULD BE REVIEWED BY THIS COURT.

The concerns expressed by petitioners are important issues which directly affect all broadcast licensees. The sudden reversal in Commission policy is certain to involve the agency more deeply in day-to-day broadcast operations. Prior political access policies acknowledging licensee latitude and discretion in dealing with candidates effectively have been eliminated by the lower court decision.

The lower court's rejection of the concept of broadcasters establishing general policies concerning federal political campaigns has tremendous implications. Such a rejection casts aside traditional Commission-supported practices which have enabled both candidates and stations to remain assured that political aspirants are being treated

[5]Indeed the Commission had consistently given this discretion to broadcasters following the passage of Section 312(a)(7) as well as before its enactment into law: "Since the passage of Section 312(a)(7) as part of the Federal Election Campaign Act of 1971, the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes 'reasonable access' under all the circumstances present in a particular case." *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C. 2d 1079 (1978).

fairly. This "similar treatment" concept is not only one of basic fairness but is also firmly established in the lowest unit rate and equal opportunities requirements embodied in the Communications Act.

The lower court's affirmation of the Commission view that broadcasters now must "individualize" their treatment of candidates is fraught with potential for inequity and abuse, intentional or not. With the many political races in a station's service area (local, statewide, and federal) the multitude of demands for access, and the differences in those demands, station management must be allowed to establish policies which both facilitate their operation in the public interest and assure *all* candidates fair treatment. Without clear policies and guidelines the variety of political requests themselves virtually guarantees that candidates will be presented to the public in a manner which cannot help but be uneven.

As an association of thousands of radio and television stations, NAB must bring to this Court's attention the detrimental effect of the lower court's decision on individual stations. These adverse effects, measured in terms of restricted First Amendment rights and emasculated journalistic and programming discretion, will be imposed on individual station licensees. Moreover, the "legal judgment" duty the Commission, with lower court approval (J.A. 28a), so willingly undertakes, amounts to an unworkable administrative task. The need for this Court's review of the lower court decision is most evident in light of the dilemma which may now confront a licensee in any major community during election time. One example would be that of a wide-serve AM station in Minneapolis, Minnesota. Analyzing the station's situation under the most conservative methodology, there are a total of nine Congressional districts in the station's coverage area. In

six of them, the licensee could anticipate a minimum of four *bona fide* primary candidates from each of the two major parties, for a total of 24 possible claimants for time. In the remaining three Congressional districts, which are predominantly urban, the station may expect a minimum of seven candidates for a separate total of 21. Because the station also covers part of Wisconsin, it could also be obligated under this decision to provide time to a minimum of four possible Wisconsin candidates for the U.S. Senate. In addition, every four years there will be perhaps a dozen candidates for the Presidency. Thus, approximately 60 federal candidates might demand that this single licensee sell them substantial blocks of time. Additionally, there are dozens of non-federal candidates that may be seeking broadcast time during these periods. In some parts of the United States, notably in the tri-State New York City market, this individual licensee problem would enlarge by geometric proportions. In short, broadcasters have many competing considerations to assess in deciding when to afford time and how much to provide individual candidates. The Commission's decisions and the opinion of the court below afford no clear standard for licensee judgment. The standard for determining when a campaign begins, a decision which the Commission will determine "objectively" as a "legal judgment," is nowhere defined. A directive for stations to focus on candidates' individual needs, as stated by the candidate, is meaningless in terms of a "weighing" process, because each candidate obviously will contend he "needs" the time requested. This in fact removes any substantive discretion from the licensee.

A clear decision is essential to delineate whose responsibility it is to determine when the many different federal election campaigns begin across the nation and how much time provided each candidate would amount to "reason-

able access." Prior to the instant controversy the individual, locally-sensitive broadcaster, in the exercise of his editorial discretion, evaluated the political climate of his service area in determining the amount of time to be allocated and the appropriate date to reasonably permit access. The lower court decision effectively removes to Washington that very important and highly localized decision, transforming it along the way from an editorial decision to a purely "legal judgment." Increased government involvement in an area as sensitive as the political arena is regarded by NAB as a highly suspect goal, especially when it is uncontested that the broadcast industry has, on the whole, met and answered fairly the needs of both the electorate and the candidates in past campaigns.

The orderly and equitable presentation of the candidates to the public has, in the past, been the responsibility of the licensee. It is the licensee who will be challenged should one or more of the candidates feel they have been dealt with unfairly. The legal and administrative costs of such an ordeal would themselves be reason enough for many station owners to give all federal candidates all the broadcast time requested. (That solution, however, is not in itself foolproof, for challenges of unfairness may still come forth.) Such a course, more importantly, is not responsible, public interest broadcasting, is inconsistent with the intent of Congress and contravenes the most basic principles of the First Amendment.

Section 312(a)(7), as interpreted by the lower court, provides yet another vehicle whereby the government is able to impose directly and more subtlety its subjective evaluation of a given situation, rather than to defer, as directed by this Court in *CBS* v. *DNC,* to the judgment of the station licensee. The Commission's decision in this case invites this added administrative involvement to all levels of

broadcasting, from the networks to the small radio or television station. This additional area of Commission activity will create further administrative mazes through which broadcast stations must find their way. The broadcast industry, which is already highly sensitized to each edict from the Commission, will be needlessly forced to anticipate, document, and defend every nuance and variation in the treatment of each individual candidate. To do otherwise would expose the licensee, at the very least, to costly Commission review of that treatment and, perhaps, to loss of a station license.

Judge Bazelon, author of the lower court's majority opinion, well described the relationship between the Commission and its licensees:

> One first notes a pervasive regulatory scheme in which the licensees are dependent on the FCC and the government for their economic well-being. The main threat is, of course, that the government can put a licensee out of business but I suppose that the more pervasive threat lies in the sub rosa bureaucratic hassling which the Commission can impose on the licensee, i.e., responding to FCC inquiries, forcing expensive consultation with counsel, immense record-keeping and the various attendant inconveniences. Next in rank in potential threats lies government refusal to grant economic and other related benefits which the licensees seek through the legislative or administrative process, such as the recent license renewal bill and grant of renewal by the Commission without a hearing. For better or worse, a licensee confronted with the choice between an economic disadvantage and pleasing the government through curtail-

> ment of a constitutional right will generally choose curtailment. Thus, licensee political or artistic expression is particularly vulnerable to the 'raised eyebrow' of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury. Examples of this process are legion.[6]

In sum, the lower court's interpretation of Section 312(a)(7) topples the delicate balance established for broadcast coverage of the electoral process. It is in conflict with basic First Amendment principles, inconsistent with the intent of Congress, fraught with the potential for political abuse and contrary to a specific holding of this Court.

CONCLUSION

For the reasons stated above and in the petitions filed before this Court, certiorari should be granted to review the judgment of the court of appeals.

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[6] *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397, 407 (1975) (separate statement of Chief Judge Bazelon).